

BEFORE THE FEDERAL COMMUNICATIONS COMMISSION

In the Matter of

Petition of Qwest Corporation for Forbearance
Pursuant to 47 U.S.C. § 160(c) in the Denver,
Minneapolis-St. Paul, Phoenix and Seattle
Metropolitan Statistical Areas

WC DOCKET NO. 07-97

COMMENTS OF

**THE PUBLIC COUNSEL SECTION OF THE
WASHINGTON STATE ATTORNEY GENERAL'S OFFICE**

AND

**THE WASHINGTON ELECTRONIC
BUSINESS AND TELECOMMUNICATIONS COALITION**

**IN OPPOSITION TO THE
QWEST PETITION FOR FORBEARANCE FOR THE SEATTLE MSA**

AUGUST 31, 2007

The Public Counsel Section of the Washington State Attorney General's office (Public Counsel) and the Washington Electronic Business and Telecommunications Coalition (WeBTEC) file these comments in opposition to the petition by Qwest Corporation (Qwest) for forbearance pursuant to 47 U.S.C. § 160(c) in the Seattle Washington Metropolitan Statistical Area (Seattle MSA).¹ Public Counsel is charged under Washington law with the responsibility of representing the interests of the customers of regulated telecommunications carriers, including residential and small business consumers. RCW 80.01.100. WeBTEC is a coalition representing the interests of large users of telecommunications services in the State of Washington. Both Public Counsel and WeBTEC have a vital interest in ensuring that (1) critical telecommunications services remain available at fair and reasonable rates, and (2) the state maintains an efficient and effective competitive marketplace that will produce public benefits. Both oppose the Qwest petition because a grant of the requested relief would reduce the level of competition in the Seattle MSA and would not be in the public interest.

I. INTRODUCTION AND SUMMARY

The Qwest petition requests the Federal Communications Commission (Commission) to forbear from applying the loop and transport unbundling requirements of 47 U.S.C. §§ 251(c), 271(c)(2)(B) (ii), and 47 C.F.R. § 51.319 (a), (b) and (e), and from certain dominant carrier

¹ In the Matter of the Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Seattle Washington Metropolitan Statistical Area, WC Docket No. 07-97, April 27, 2007 (Petition or Forbearance Petition).

requirements, price cap rules, and comparably efficient interconnection and open network architecture requirements.²

In order to obtain the requested forbearance, Qwest bears the burden of proving that: (1) enforcement of the provision or regulation is not necessary to ensure that the charges, practices, classifications or regulations by, for, or in connection with that service are just and reasonable and are not unjustly or unreasonably discriminatory; (2) enforcement of the provision or regulation is not necessary for the protection of consumers; and (3) forbearance from applying the provision or regulation is consistent with the public interest.³ In determining if Qwest has met its burden, the Commission must consider whether forbearance will promote competitive market conditions.⁴

Public Counsel and WeBTEC oppose the approval of this petition because the loss of access to unbundled network elements, particularly the loop (UNE-L), would significantly reduce the level of competition in the Seattle MSA. The continued enforcement of the pro-competitive unbundling obligations of federal law is necessary to ensure that consumers, particularly business customers, have access to reasonably priced competitive alternatives. In the Seattle MSA competitive local exchange carriers (CLECs) are highly dependent on the availability of cost-based unbundled loop and transport in order to provide competitive services to small business and enterprise customers.

As explained below, the Washington Utilities and Transportation Commission (WUTC) has recognized the level of CLEC dependence on the use of Qwest facilities each time the agency has investigated the state of competition in the Qwest service territory. The WUTC

² *Id.*, p. 3.

³ 47 U.S.C. § 160(a).

⁴ 47 U.S.C. § 160(b)

findings that Qwest (or its predecessor, US West) did not have market power were based on the ability of CLECs to lease Qwest's facilities pursuant to the unbundling requirements of federal law.

It is noteworthy that the overwhelming majority of the evidence supporting the Qwest petition is associated with the efforts of cable companies and other intermodal providers to provide residential telephone service, not service to business customers. UNE-L, however, is primarily used by CLECs to provide service to the small business and enterprise markets. Therefore, the Qwest evidence is largely irrelevant to the decision in this proceeding.

With regard to the mass market in Washington, as described further below, the WUTC very recently concluded in a case with a detailed evidentiary record that the market for basic residential service in Qwest's service territory is not competitive.

II. WUTC DECISIONS GRANTING QWEST PRICING FLEXIBILITY FOR BUSINESS CUSTOMERS HAVE RELIED ON THE AVAILABILITY OF UNES

Over the last several years, the Washington Utilities and Transportation Commission (WUTC) has granted Qwest pricing and other regulatory flexibility over its dedicated and switched business services by classifying those services as competitive.⁵ In most cases, these decisions were made after evidentiary hearings in cases that involved extensive review of public and confidential market information provided by Qwest and competitive providers. Under Washington law, the WUTC can classify services as competitive and subject only to minimal regulation if, after considering a number of indicators of market power, it concludes that the

⁵ See e.g., WUTC Docket No. UT-990022, Eighth Supplemental Order, December 21, 1999 (DS-1 and higher capacity circuits); Docket No. UT-000883, Seventh Supplemental Order, December 18, 2000 (services provided on DS-1 and higher capacity circuits), Docket No. UT-030614, Order No. 17, December 23, 2003 (analog business services); and Docket No. UT-050258 (digital business switched and private line). These orders are available on the WUTC website.

services are subject to effective competition. RCW 80.36.330(1). The competitive classifications granted to Qwest have been based in substantial part on the continued availability of cost-based, unbundled network elements (UNEs) to competitive local exchange carriers.

It is particularly instructive to review WUTC's findings in Docket No. UT-030614. This proceeding focused on the competitive classification of analog business services, including "1FB," basic single-line business flat rated local service. The WUTC noted that the HHI index was higher than 5,000 in every exchange.⁶ It is also noted that of the "CLEC analog business lines in Qwest exchanges, 20 percent are provided through CLEC-owned facilities, 27 percent through UNE-P, 43 percent through UNE-L, and 10 percent through resale."⁷ Even with the high concentration in each market and the very heavy reliance on Qwest facilities to provide service, the WUTC still found that effective competition existed in the market for analog business services. It did so because it found that UNE-P and UNE-L were price constraining services.⁸ The WUTC stated:

The price the CLEC pays for a UNE is fixed, not tied in lock-step to Qwest retail rates, as is the case with resale. If Qwest were to raise retail prices, the CLECs could use the increased margin between Qwest's new retail prices, and the CLEC's UNE-P/UNE-L cost to compete more effectively against Qwest's price. Moreover, the CLEC may offer its customers different bundles of services that incorporate UNE-P, differentiating itself from Qwest in more than price. *UNE-L offers even greater opportunities for this differentiation.*⁹

In other words, the availability of UNE-P and UNE-L at rates determined using FCC-approved cost standards, and the fact that the cost standard is not related to or dependent on the

⁶ *In the Matter of Qwest Corporation for Competitive Classification of Basic Business Exchange Services*, UT-030614, Order No. 17, ¶ 30.

⁷ *Id.*, ¶ 26.

⁸ *Id.*, ¶¶ 96, 143.

⁹ *Id.*, ¶ 96 (emphasis added).

Qwest retail rate, was presumed to prevent Qwest from exercising monopoly power.¹⁰ The assumption was that if Qwest raised the rates of analog business services, CLECs purchasing UNE-P and UNE-L would have the ability and incentive to serve more customers. CLEC profits would increase and Qwest would lose retail customers.

The WUTC, therefore, held that effective competition existed and it competitively classified Qwest's analog business services statewide, finding:

The Commission is persuaded that the seemingly high market share and market concentration figures gleaned from Qwest and Staff's analyses are counterbalanced by evidence of a strongly pro-competitive market structure, which has undergone significant change since our decision in UT-000883. CLECs using UNE-P are present in 61 of 68 Qwest exchanges, where over 99% of Qwest's analog business customers reside. Competition in the form of UNE-P, UNE-L, or CLEC-owned facilities is present in all but one exchange. CLEC competition has contributed in a significant way to Qwest's line loss. CLECs' market share, statewide and as more granularly examined, shows that CLECs provide workable and meaningful competition for local exchange analog business services.¹¹

Circumstances have changed significantly since the order in WUTC Docket No. UT-030614 was issued. UNE-P is no longer available and, thus, it cannot constrain Qwest's ability to increase rates. Now, if the instant petition is approved, UNE-L also will not be available, eliminating the bulk of the price constraining lines.

While some CLECs may continue to purchase Qwest wholesale services under commercial agreements, Qwest would be free to increase the rates for the services sold through those agreements at will. The final result would be that Qwest would be able to charge unjust and unreasonable rates to competitors and that business consumers would lose competitive options.

¹⁰ On the other hand, resale service rates increase with increases in Qwest rates and therefore, do not have the ability to constrain Qwest pricing policies.

¹¹ Docket No. UT-030614, Order No. 17, ¶ 99 (footnote omitted).

If the FCC were to grant Qwest's forbearance petition and relieve it of the obligation of offering UNEs at cost-based rates, it would completely undercut the primary basis of the regulatory flexibility that has been granted the company to date with regard to its business services. The results could be very disruptive. These outcomes would in no way promote the public interest.

III. THE BUSINESS MARKET

A. The Experience of Enterprise Customers

Based on the experience of its members in the market, WeBTEC does not believe that eliminating Qwest's obligation to provide CLECs with access to cost-based UNEs is in the public interest at this time. Indeed, while certain wireline CLECs have some facilities (usually fiber-optic rings located in larger urban areas) and have a few "on-net" customers, they are highly dependent on the facilities of the incumbent to reach most customer locations in Qwest's service territory.

If Qwest were relieved of its unbundling obligation, CLECs would have to rely on Qwest's special access services to reach most end-user customer locations. As the AdHoc Telecommunications Users Committee members have reported to the FCC, "[w]hen business users require dedicated voice and data connections from the places of work to the world more than nine times out of ten the only provider available to offer that connection is an ILEC."¹²

This is a particular concern because Qwest's special access services are priced far in excess of the cost-based UNE rates that the Washington Commission has established. The UNE

¹² Comments of Ad Hoc Telecommunications Users Committee, *In the Matter of Special Access Rates for Price Cap Local Exchange Carrier, AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, CC Docket No. 05-25, Appendix 1, "Special Access Overpricing and the US Economy," by Economics and Technology, Inc., at 2.

rate for 10 miles of DS1 transport, for example, is \$39.62. The month-to-month rate for the equivalent DS1 transport out of Qwest's interstate tariff is \$252, more than five times the UNE rate. Qwest's interstate tariff rate for DS3 transport is over 300 percent higher than the UNE rate, and Qwest offers dark fiber transport and loops at "commercial" rates that are over 600 percent and 700 percent higher, respectively, than the comparable UNE rates. Qwest's intrastate private line rates for DS1 and DS3 transport and loop facilities (Qwest does not have an intrastate dark fiber offering) generally exceed UNE rates by over 200 percent to 300 percent.

The only alternative to the month-to-month special access rates Qwest charges is its so-called Regional Commitment Plan (RCP) rates, which are lower than the month-to-month rates but still significantly higher than the UNE rates. Moreover, the Plan requires the CLEC to commit for a four-year term and purchase at the RCP rates at least 90 percent of all the DS1s and DS3s it buys from Qwest throughout Qwest's 14-state service territory.¹³ Such prices and contractual terms are not indicative of a competitive marketplace and clearly would have a significant negative impact on CLECs that are dependent on Qwest's facilities to access their end-user customers. Customers can only suffer in such an environment.

These prices and pricing behaviors on the part of Qwest are conclusive evidence that Qwest is exercising significant market power over its special access services. If the FCC were to remove Qwest's unbundling obligation, it would in effect be allowing Qwest to further extend its market power over its retail dedicated and switched services and to do so virtually unconstrained by competition.

¹³ See McLeodUSA Telecommunications Services, Inc.'s Petition for Modification of the Qwest Omaha Forbearance Order, *In the Matter of Petition of Qwest Corporation For Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, WC Docket No. 04-223, Memorandum Opinion and Order, FCC 05-170 (rel. Dec. 2, 2005).

B. Competition From Cable, Wireless, And VoIP Providers For Business Customers Does Not Justify Forbearance

To justify its requested relief, Qwest cites increasing competition from cable, wireless, and Voice-over-Internet Protocol (VoIP) providers. However, none of these factors justifies removing Qwest's unbundling obligation and its dominant carrier regulation. First, as a general proposition, the Qwest evidence primarily describes rivals' activities in the residential market and therefore, does not support any action by the FCC that would affect the level of competition in the small business and enterprise market.

To the extent business is addressed, the case is not persuasive. Cable services are not a real substitute for most enterprise and other business customers. Generally, cable companies have not deployed their networks to cover business areas; they have deployed their plant primarily in residential areas in order to provide entertainment video services. To the extent they do have plant near businesses, cable companies are just beginning to offer services to businesses and then generally only to the smallest businesses that can be served by the same products offered to residential customers. Cable companies do not target larger businesses and are not considered to be viable substitute providers by those businesses.

While many enterprises, including WeBTEC members, buy considerable quantities of wireless services, those services are merely an adjunct that allows employees to communicate while they are mobile. They do not replace, and are not a substitute for, the wireline services the enterprise buys.¹⁴ Small business as well uses wireless as a supplement to its wireline service, not a substitute.

¹⁴ To the extent wireless substitution exists, it primarily occurs in the residential market. According to the FCC's latest *Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services*, WT Docket No. 06-17, FCC 06-142, released September. 29, 2006, at ¶ 205, about 8% of U.S. households

Qwest notes that estimates of the number of customers that have “cut-the-cord” in the Seattle MSA may be as high as 13 percent. While this number is higher than the national average, it still means that overwhelming majority of individuals purchase and use both wireless and wireline service. The usage pattern means that a consumer now has two methods of communicating instead of one. The total amount of communications has increased and the convenience of telecommunications has also increased. However, there is no evidence that shows that the presence of the wireless product would constrain Qwest from exercising market power by increasing its rates by more than a small but significant and non-transitory amount.

The Qwest petition speaks in dramatic terms of the potential competition that independent “over-the-top” VoIP providers will bring to the market. Qwest quotes predictions of “exponential growth until at least 2010.”¹⁵ VoIP, however, is still a fledgling service and is used primarily, if at all, for internal communications or for long distance services. It requires a broadband connection, which, in the case of a business, is most likely provided by an ILEC.

Vonage, the poster child of the VoIP market, lost 65 percent of its market value this year and faces the continuing impacts of a patent infringement suit. Some months ago, a jury in Virginia found that Vonage infringed on three Verizon patents. The court issued an injunction to bar Vonage from signing up new customers. While the injunction has been stayed and the case is on appeal, Vonage’s business is suffering. Another leading VoIP provider, Sunrocket, recently ceased operations. Thus, at this point in time, a significant question remains about whether VoIP providers will be able to survive. Accordingly, it would be premature to rely on VoIP as a basis for granting forbearance.

that subscribe to cell phone service had given up their landline phones. Approximately 6% of the total U.S. populations rely exclusively on wireless phones.

¹⁵ Forbearance Petition, p. 14.

V. QWEST'S RESIDENTIAL MARKET IS NOT COMPETITIVE

As noted above, much of Qwest's support for the petition consists of extensive descriptions of the level of intermodal competition alleged to exist in Washington. The WUTC very recently considered this same issue in connection with Qwest's application for an alternative form of regulation (AFOR) in Washington, pursuant to RCW 80.36.135. The WUTC ultimately granted Qwest's petition based largely on a plan agreed to between Qwest and the WUTC Staff.¹⁶ Of key importance for the FCC's consideration here is the fact that the plan presented by Qwest and Staff effectively conceded that basic residential telephone service continued to require traditional regulatory protection. While pricing flexibility and other regulatory relief were granted to Qwest for a range of competitive services, basic residential service remains under tariff, although a \$1.00 increase in the basic rate was allowed. In addressing Public Counsel's arguments against the increase, the Commission held:

With respect to Public Counsel's arguments that Qwest could not increase rates for residential service if the market were truly competitive, we agree with Qwest that the issue is moot. *It appears uncontested that the market is not truly competitive. Most importantly, the residential market remains under tariff and is not treated as competitive during the AFOR's term.*¹⁷

Both Qwest's position in supporting the plan and the WUTC's decision directly contradicts the assertions in this docket regarding mass market competition. The WUTC findings, based on an extensive record, including confidential market information and analysis, are totally inconsistent with a finding that the statutory test for forbearance has been met.

¹⁶ *In the Matter of the Petition of Qwest Corporation To Be Regulated Under An Alternative Form of Regulation Pursuant to RCW 80.36.135*, Docket No. UT-061625, Order 06. WeBTEC signed the AFOR settlement agreement. It did not take a position on whether the overall AFOR proposal was in the public interest. Public Counsel did not join the settlement and opposed a number of major components of the plan. Public Counsel presented an alternative AFOR plan for Commission consideration.

¹⁷ *Id.*, ¶ 66.

The relationship between the Washington AFOR case and this docket is important in another aspect as well. When Qwest and the WUTC Staff filed their agreed AFOR plan with the Commission, they filed with it, as required, a Joint Narrative Statement of Qwest and Commission Staff Supporting Settlement Agreement. The narrative addressed the requirements of the Washington AFOR statute, including the requirement that the WUTC consider whether a proposed AFOR would “preserve or enhance the development of effective competition and protect against the exercise of market power during its development.” RCW 80.36.135(2)(c). On this issue, Qwest and WUTC Staff stated:

Qwest and Staff believe that the plan preserves competition by maintaining the status quo for all of the market-opening and wholesale provisions under the Telecommunications Act of 1996.¹⁸

The following month, following the evidentiary hearing in the Washington AFOR case, Qwest filed its forbearance petition. Clearly, notwithstanding the statements made in the Washington AFOR case, the Qwest forbearance petition seeks to change the status quo on the basis of a market description at odds with the uncontested findings in the Washington case.

VI. CONCLUSION

Qwest has not demonstrated that it meets the tests for forbearance in the Seattle MSA. Approval of the instant petition would undermine the foundation of the WUTC’s actions in classifying Qwest’s business services in Washington as competitive. In the absence of cost-based UNEs, the current level of competition is not sufficient to discipline Qwest’s market power and constrain it from charging supra-competitive prices. Competition in the Seattle MSA

¹⁸ Docket UT-061625, Joint Narrative Statement of Qwest and Commission Staff Supporting Settlement Agreement, ¶ 35.

would be eroded rather than enhanced and consumers would be harmed. Qwest's petition should, therefore, be denied.

RESPECTFULLY SUBMITTED this 31st day of August, 2007.

Washington Electronic and
Business and Telecommunications
Coalition

By: 

Arthur A. Butler
Attorney at Law
WSBA # 04678
Ater Wynne LLP
601 Union Street, Suite 1501
Seattle, WA 98101-2341
Of Attorneys for WeBTEC

ROBERT M. McKENNA
Attorney General

By: 

Simon J. ffitch
Assistant Attorney General
Public Counsel Section Chief
WSBA # 25977
Washington State Attorney General
800 5th Avenue, Suite 2000
Seattle, WA 98104-3188